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No. 391

IN THE

Supreme Court of the United States

ROBERT BALLARD BAILEY,
Petitioner and Appellant Below,

v.

THE STATE OF WEST VIRGINIA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

W. HAYES PETTRY,
Attorney for and of Counsel with Petitioner.

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.



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IN THE

Supreme Court of the United States

ROBERT BALLARD BAILEY,
Petitioner and Appellant Below,

v.

THE STATE OF WEST VIRGINIA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

To the Honorable, the Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert Ballard Bailey, respectfully represents and prays that a writ of certiorari issue to review the judgment of the Intermediate Court of Kanawha County, West Virginia, entered in the above cause on the 9th day of March, 1950, (R. 160), and also the final judgment order of the Circuit Court of Kanawha County, West Virginia, entered in the above cause on the 13th day of May, 1950, (R. 161). The Supreme Court of Appeals of West Virginia denied a writ of error and supersedeas in said cause four distinct and separate times: First denial (R. 1); second denial (R. 162); third denial (R. 164); fourth denial (R. 164); and on the fifth application on August 8th, 1950, the Supreme Court of Appeals of West Virginia held that the courts below were plainly right and the judgment of the said Supreme

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Court of Appeals of West Virginia became a final order. (R. 182). The Supreme Court of Appeals of West Virginia is the highest tribunal of the State of West Virginia.

I.

JURISDICTION

The jurisdiction of this Court is founded on Title 28, U. S. Code, Section 1257(3), and the Revised Rules of the Supreme Court of the United States. Rule 38 § 5(a).

II.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent parts of the Sixth and Fourteenth Amendments to the Constitution of the United States and the pertinent parts of Article 3, Sections 10 and 14 of the Constitution of West Virginia are printed in Appendix "A".

III.

STATEMENT OF THE CASE

(a) Statement of the Questions Involved

1. Whether the trial court erred in refusing to instruct the jury to find the defendant not guilty.

2. Whether the trial court erred in denying the motion of the petitioner to set aside the jury verdict.

3. Whether the trial court erred in refusing to sustain the motion of the defendant to strike out all the testimony of Joe Fazio, Frank Fazio and Mrs. Frank Fazio relating to the dying declaration of the decedent Rosina Fazio. (R. 100).

4. Whether the trial court erred in giving Instructions Nos. 1, 2, 3 and 4 as offered by the State.

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5. Whether the trial court erred in refusing to give Instructions Nos. 1, 2, 3, 4, 6, 9, 13, 14, 18, 19, 20, 23, 25, 26, 29 and 35 as offered by the defendant.

6. Whether the Supreme Court of Appeals of West Virginia erred in refusing to follow the principle of law as enunciated by this Court in the case of *Shephard* vs. *United States*, 290 U. S. 96, that the statement of a person who says: "I am not going to get well" and "I am going to die" is a statement of anticipation of death but does not imply that the declarant had abandoned all hope of recovery, and any statement made at that time relating to the cause and reason of declarant's condition is not admissible in evidence as a dying declaration.

7. Whether the Supreme Court of Appeals of West Virginia erred in refusing to follow the cases of *Carver* vs. *United States*, 160 U. S. 532, and *Mattox* vs. *United States*, 146 U. S. 140, wherein the court upheld the trial court in admitting the statement of Rosina Fazio in evidence as a dying declaration without the proper foundation being laid,—that Rosina Fazio's state of mind was consciousness of impending and certain death and despair of recovery.

8. Whether the Supreme Court of Appeals of West Virginia erred in refusing to grant a writ of error and supersedeas reversing the Circuit Court of Kanawha County, West Virginia, and the trial court.

9. Whether the Supreme Court of West Virginia erred in refusing to consider affidavits of Thelma Coleman and John Coleman as newly discovered evidence and grant a new trial to defendant.

(b) Statement of Proceedings

An indictment was returned by the Grand Jury for the State of West Virginia, January, 1950, Term of the Intermediate Court of Kanawha County, West Virginia,

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charging your petitioner with the murder of Rosina Fazio. A demurrer was interposed to the indictment and a motion was made to quash the indictment, which said motions were denied. The case proceeded to trial before the court and a jury and at the end of the evidence the defendant moved the court to instruct the jury to find him not guilty, which motion was denied by the court. At the end of the entire case the jury returned a verdict of guilty. A motion was made to set aside the verdict of the jury and to grant a new trial. This motion was denied, and the court sentenced your petitioner to death by electrocution at the Penitentiary at Moundsville, West Virginia, on the 16th day of June, 1950, upon the conviction of murder in the first degree without recommendation of mercy.

(c) Statement of the Case

Your petitioner on October 22, 1949 (R. 125) returned to Charleston, his home, about one o'clock from a hunting trip. He met some friends on returning; they bought some wine and drank it. This was about two-thirty P. M. that afternoon; then he went to a gas station on Central Avenue at about three-thirty that same afternoon. The police arrested three boys at the gas station who were with your petitioner. (R. 54). Petitioner escaped in his car before the police could arrest him, and the police pursued petitioner and chased the petitioner for several blocks and finally petitioner eluded the police and during the chase the police hit petitioner's automobile with three bullets in the rear of his car. (R. 56). This occurred that afternoon after three-thirty P. M. (R. 54). The three boys who were arrested by the police were booked at Police Headquarters about three-thirty-eight P. M. (R. 142). At about five-fifteen P. M., the same evening, (R. 103) the petitioner was seen by Mr. Warner, a former State Police, in Charleston. Warner saw no one in petitioner's car and he was driving at a

reasonably slow rate of speed. (R. 103). Petitioner had previously been convicted of three felonies and had served a sentence for each crime (R. 139). Under the West Virginia Habitual Criminal Act another felony committed by the petitioner would mean life imprisonment. Also the petitioner had been previously convicted of driving drunk and at the time he was convicted of driving drunk the law in effect then was that a second conviction was a felony. Petitioner did not return home until about eight-thirty P. M. that evening. (R. 129). About eleven o'clock A. M., the next morning petitioner went to a friend's home and stayed there at the friend's home Sunday night and on Monday he went to Florida, and while he was going to Florida he was unaware of the Mrs. Rosina Fazio incident. (R. 133).

Mrs. Rosina Fazio, of whose murder the petitioner was convicted, was found the night of October 22, 1949, at about eleven-thirty P. M. by Ruth Prenty on a street in the rear of Mrs. Fazio's place of business. (R. 49). Upon discovery of Mrs. Fazio, Mrs. Prenty sent for Mrs. Jeannie Shafer. Mr. Dominic Fazio, the husband of Rosina Fazio, was notified and came to the scene. (R. 50). Mrs. Fazio was taken in an ambulance to the hospital and her husband, Dominic Fazio, accompanied her to the hospital. At their arrival at the hospital Mr. Fazio, the husband of Rosina Fazio, took something resembling a pocketbook from Mrs. Fazio. (R. 90). At the hospital it was discovered that Mrs. Rosina Fazio had suffered an injury to her spine and possibly a broken neck which paralyzed her from the waist down. (R. 24-27). She remained in the hospital until her death Tuesday morning, October 25, 1949. (R. 85). The record discloses that the police were not called in until about nine o'clock Sunday morning, the day after Mrs. Fazio was found. (R. 80).

The Record discloses (R. 29) that about ten minutes after three o'clock P. M. Mrs. Rosina Fazio was at the home of Mrs. Joe Vettri, going to the store a few blocks away. The next time Mrs. Fazio was seen was by Ruby Evans on Bullitt Street (R. 31) in an automobile. Ruby Evans testified that she did not know the man with whom Rosina Fazio was riding, but at the trial (R. 31) she identified the man driving the car as the petitioner, and that it was three-thirty o'clock in the afternoon when she saw Mrs. Fazio. (R. 32). At that time the petitioner was being pursued by the police officers in another section of the city. (R. 56). The next place Mrs. Rosina Fazio was seen was (R. 35) about a five minute drive from where Mrs. Ruby Evans had seen her at three-thirty o'clock. She was seen by Thelma Coleman (R. 35) and Walter J. Mullins (R. 43) where they found her lying in a ditch. Mrs. Coleman saw a car going by and heard a woman scream. She went up the road and found Mrs. Fazio lying in the ditch. (R. 35). Walter J. Mullins saw a car which he identified as a black Dodge Sedan, 1946 Model, going up the road; (R. 43) saw the right door open and a woman's leg protrude from the car; the car went around a curve out of sight and when he reached the curve he saw Mrs. Fazio lying in the ditch. (R. 43). The time was fixed by Mullins (R. 43) as between three-thirty and four o'clock the same afternoon. This would seem to corroborate Mrs. Ruby Evans (R. 32) having seen Mrs. Fazio at three-thirty because it is about a five minute drive from where Mrs. Evans had seen Mrs. Fazio to the place where Mullins and Mrs. Coleman found her. Mullins (R. 45) identified the driver of the car which came back to where Mrs. Fazio was lying in the ditch, and Mullins and the driver of the car, whom Mullins identified as Bailey, put Mrs. Fazio in the car. NOTE: Mrs. Coleman who was present when Mrs. Fazio was found and placed in the car says that she had no idea who the man was that came in the automobile,

but in her affidavit (R. 178) she says that she told the Prosecuting Attorney that she did not know the man who picked Mrs. Fazio up, and the affidavit further states that the man who picked Mrs. Fazio up was not Robert Ballard Bailey. Also the affidavit of John Coleman, husband of Thelma Coleman, (R. 179) who came in a taxi to the scene asserts that it was a green car and the man driving the car was not Robert Ballard Bailey, (R. 180) and that before the trial he had told the police officers who showed him a picture of Robert Ballard Bailey that it was not the picture of the man who was driving the car in which Mrs. Fazio was sitting at the time he came to the place where Mrs. Fazio was found. It is interesting that Mrs. Coleman was not called upon to identify Bailey in the court room, and also that her husband was not called by the State as a witness. Also it is an oddity that Mullins when he helped place Mrs. Fazio (R. 45) in the car did not inquire of the driver of the car what had happened to cause Mrs. Fazio to come out of said car and fall into the ditch, and why Mr. Mullins would put Mrs. Fazio into the same car from which she had fallen. The State is void of any evidence as to Mrs. Fazio's whereabouts from three-thirty or four o'clock P. M. until eleven-thirty P. M. when she was found, although the petitioner was seen by Mr. Warner about five-fifteen o'clock that same evening and Mr. Warner saw no one in his car. (R. 103).

The only evidence as to the purported statements of Mrs. Rosina Fazio which were used by the State as a dying declaration was the testimony of Joe Fazio, (R. 79) and Frank Fazio (R. 97), sons of Mrs. Rosina Fazio, and Mrs. Frank Fazio, (R. 99) a daughter-in-law of Mrs. Rosina Fazio, although two doctors had seen her and several nurses had attended her. The purported dying declaration was made on Sunday, October 23, 1949. Mrs. Fazio died October 25, 1949, two days later. Joe Fazio

testified (R. 78) that he went to the hospital on Sunday morning between six and seven o'clock; that he saw his mother on that occasion and talked to his mother concerning her injuries and her life expectancy and that she told him that she couldn't move her lower limbs (R. 78-79) and that her bones had been broken and that Bob had broken all her bones and that she was going to die, (R. 79) and at the same time Mrs. Fazio told Joe that she hadn't had anything to eat for two days; (R. 79) that she said Bob, the Glass Cutter had caused her injuries. About nine o'clock A. M. he went to the police station and a negative of Robert Ballard Bailey was supplied and a picture was developed and Joe Fazio took the picture to the hospital (R. 80) and showed it to Mrs. Rosina Fazio and told her he was going to show her a picture of Robert Ballard Bailey and wanted her to answer if it was his picture and she said, "Yes, it was him." (R. 81) and at the same time she said she was going to die and that Robert Bailey had robbed her.

Frank Fazio, another son, testified (R. 97) that his mother told him that "Bob, the Glass Cutter", had caused her injuries; that she couldn't feel anything; "all my bones are broken; I am going to die."

Mrs. Frank Fazio testified (R. 99) that on Sunday, October 23rd, 1949, she was present with her husband, Frank Fazio, and that Mrs. Rosina Fazio said she was going to die; "He killed me, he broke all my bones and I know I will die."

Dr. H. M. Hills, Jr., Mrs. Fazio's doctor, testified (R. 27) that he saw Mrs. Fazio at the hospital about midnight or early Sunday morning; that on Sunday, October 23rd, he saw Mrs. Fazio in the forenoon and the afternoon and that she was mentally alert after she had recovered from shock. (R. 28). Dr. Hills' evidence does not disclose that he informed Mrs. Fazio of any impend-

ing and certain death. Also the record is silent as to whether any qualified person had informed Mrs. Fazio that she was going to die or that her death was immediate or certain.

IV.

REASONS FOR ALLOWANCE OF WRIT

1. This Court should take jurisdiction of this case for the reason that the Supreme Court of Appeals of West Virginia did consider and dispose of the federal question by their final order. (R. 183).

In the cases of *Radio Station W. O. W.* v. *Johnson*, 326 U. S. 120; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *Helvering* v. *Wiese*, 292 U. S. 614; *United States* v. *Rabinowitz*, 339 U. S. 56; *Ickes* v. *Virginia Colorado Dev. Corp.*, 295 U. S. 639, 640-646; *Six Companies* v. *Highway District*, 311 U. S. 180; *West* v. *American T. & T. Co.*, 311 U. S. 223; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, this Court held in effect that when the highest State Court uses language indicating that the Federal question was considered and disposed of by the court, then this Court may assert its jurisdiction in the same manner had the question been raised prior to the original disposition.

In the case of *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 267-8, and *Edwards* v. *Elliott*, 21 Wall 532, 549-51, this Court held in effect that any deficiency in the petition in which a Federal issue is framed is cured after the highest State Court assumes that a specified Federal issue is properly before it and then expressly considers and determines that issue. In that event, the Supreme Court of the United States does not inquire into the framing of the issues between the litigants in the first instance.

In the case of *Louisville & Nashville R. R. Co.* v. *Higdon*, 234 U. S. 592, this Court held in effect, but when-

ever the highest State Court does consider and decide the Federal question, despite any tardiness in their assertion, the Supreme Court will not go behind the action of the Court in that respect, and this Court may take the question on the assumption that the Federal issues were properly raised.

In the case of *First National Bank* v. *Hartford*, 273 U. S. 548, this Court held that the finding of the State Court that an asserted Federal question was without basis in fact was not binding on the Supreme Court.

2. That the Supreme Court of Appeals of West Virginia by refusing to review and affirming the trial court has in effect decided the words "I am not going to get well" and "I am going to die" implies that declarant has abandoned all hope of recovery and any statement made at the same time relating to the cause and reason for the declarant's condition is admissible in evidence as a dying declaration.

The refusal of the Supreme Court of Appeals of West Virginia to review this case and assertion that the trial court was plainly right is in direct conflict with the decision of *Shephard* v. *United States*, 290 U. S. 96 wherein this Court held that the words "I am not going to get well" and "I am going to die", as used by the declarant, were statements of anticipation of death but do not imply that the declarant has abandoned all hope of recovery and any statement made at the same time relating to the cause and reason for the declarant's condition is not admissible in evidence as a dying declaration. *Shephard* v. *United States*, *Supra*, was cited to the Supreme Court of Appeals and the Court was asked to follow it. (R. 165).

3. The Supreme Court of Appeals of West Virginia has never decided the proposition where a statement made by a declarant who said "I am not going to get well" and "I am going to die" are words sufficient to lay

the foundation that declarant's state of mind was consciousness of impending and certain death and despair of recovery in order that a statement made at the same time was admissible in evidence as a dying declaration.

The Supreme Court of Appeals of West Virginia, in refusing to follow the *Shephard* v. *United States, Supra,* case was in conflict with the decision of this Court and the Courts of other jurisdictions in cases which involve a question of extreme gravity and general importance, and a writ of certiorari should be granted, *Fields* v. *United States,* 205 U. S. 292; *People of the State of Illinois, Ex Rel Gordon, Director of Labor* v. *United States,* 328 U. S. 8.

4. The Supreme Court of Appeals of West Virginia is not in accord with the decisions of this Court and is in direct conflict with the decisions of this Court in the cases of *Carver* v. *United States,* 160 U. S. 532, and *Mattox* v. *United States,* 146 U. S. 140, wherein the Supreme Court of Appeals of West Virginia upheld the trial court in admitting the statement of Rosina Fazio in evidence as a dying declaration without the proper foundation being laid, — that Rosina Fazio's state of mind was consciousness of impending and certain death and despair of recovery.

5. The Supreme Court of Appeals of West Virginia has decided a federal question in such a way which is not in accord with the applicable decisions of this Court. Revised Rules of the Supreme Court of the United States, Rule 38 § 5(a).

6. The action of the Supreme Court of Appeals of West Virginia by refusing to review this case affects the scope of prior rulings of this Court wherein it was presented to the Supreme Court of Appeals of West Virginia by the cases of this Court cited to them in petitioner's brief as to dying declarations. The refusal of the

Supreme Court of Appeals of West Virginia to follow this Court is in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States in that the accused shall be confronted with the witnesses against him, (the exceptions being dying declarations).

7. The Supreme Court of the United States should take jurisdiction of this case because of the gravity of the death penalty imposed on Robert Ballard Bailey without due process of law, wherein the Supreme Court of Appeals of West Virginia refused to review this case and grant the petitioner a new trial upon presentation of newly discovered evidence; therefore, in violation of the Fourteenth Amendment of the Constitution of the United States.

8. The decisions of the Supreme Court of Appeals of West Virginia should be in uniformity with this Court and the various other State Courts and also should be uniform and in conformity with its own decisions, and this Court should grant the writ of certiorari as prayed and correct the action of the Supreme Court of Appeals of West Virginia heretofore taken herein.

PRAYER

WHEREFORE, petitioner prays that this petition be granted and for such other and further relief in the premises that may be proper and just.

This the 24th day of October, 1950.

ROBERT BALLARD BAILEY,

By W. HAYES PETTRY,
Attorney for and of
Counsel with Petitioner.

IN THE

Supreme Court of the United States

ROBERT BALLARD BAILEY,
Petitioner and Appellant Below,

v.

THE STATE OF WEST VIRGINIA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

OPINION OF THE COURT BELOW

The Supreme Court of Appeals of West Virginia held that the courts below were plainly right and there was no written opinion by any court.

II.

JURISDICTION

1. The jurisdiction of this Court is founded on Title U. S. C. Section 1257 (3) and Revised Rules of the Supreme Court of the United States, Rule 38 § 5(a).

2. The judgment of the Supreme Court of Appeals of West Virginia holding that the courts below were plainly right was entered August 8, 1950.

III.

STATEMENT OF THE CASE

1. The facts of the case have already been related in the preceding petition under Title III (c).

2. The Assignment of Errors have already been related in the preceding petition under Title III (a).

IV.

GROUNDS FOR JURISDICTION

The grounds on which jurisdiction of this Court is invoked have already been related in the preceding petition under Title IV—Reasons for Allowance of Writ.

V.

ARGUMENT

(a) The trial court admitted the statement of Rosina Fazio in evidence as a dying declaration without the proper foundation being laid that Rosina Fazio's state of mind was consciousness of impending and certain death and despair of recovery and was violative of petitioner's rights under the Sixth and Fourteenth Amendments of the Constitution of the United States and of Sections 10 and 14 of Article 3 of the Constitution of West Virginia.

The State failed as a preliminary fact to lay the foundation that Rosina Fazio's state of mind was consciousness of certain and immediate death and despair of recovery. The Circuit Court of Kanawha County and the Supreme Court of Appeals of West Virginia, in effect, held that there was no error in the trial court's refusal to grant the motion of petitioner to exclude the purported dying declaration of Rosina Fazio.

Evidence as to the life expectancy of Mrs. Rosina Fazio was that of her two sons and daughter-in-law, and her statement was in effect, — I am not going to get well,

and I am going to die, — and that Robert Bailey had robbed her, and at the same time Mrs. Fazio said that she had had nothing to eat for two days. This statement was made two days prior to her death. (R. 79). It is to be noted that no other persons heard these remarks by Mrs. Fazio other than her two sons and her daughter-in-law, although Dr. Hills was there that day and saw Mrs. Fazio, the nurses who attended her were there, and the police who were not admitted were at the door of Mrs. Fazio's room at the hospital. No competent authority at that time, according to the record, had advised Mrs. Fazio of immediate and certain death, and the record is silent as to the opinion of the doctors and nurses in regard to Mrs. Fazio's life expectancy, and it is strange that Mrs. Fazio would be concerned about not having had anything to eat for two days if she thought that her death was immediate and certain.

In reaching its conclusion the learned court failed to follow the decisions of this Court in the cases of *Carver* v. *United States*, 160 U. S. 532, *Mattox* v. *United States*, 146 U. S. 140, and *Shephard* v. *United States*, 290 U. S. 96, and other authorities and representative decisions.

By the weight of authority it is held that the preliminary matters necessary to the admission in evidence of a dying declaration must be proved beyond a reasonable doubt. The courts require that same degree of proof of these facts as required with respect to proof of the elements of the crime itself.

In the case of *Carver* v. *United States, Supra*, this Court held:

> "While in the admission of the declarations of the victim as to the facts of a homicide the utmost caution must be exercised to the end that it be satisfactorily established that they were made under the impression of almost immediate dissolution."

Both the Constitution of the United States and of the State of West Virginia, see Appendix "A", require that the accused shall be confronted with the witnesses against him. The only exception is a dying declaration in the trial of homicide and that is upon the theory that the sense of impending death and without any expectancy or hope of recovery will supplant the solemnity of an oath. We submit there is no evidence in this case that Mrs. Rosina Fazio was conscious of impending and certain death and despair of recovery.

The Supreme Court of West Virginia has never decided the proposition whether a statement made by a declarant who said: "I am not going to get well" and "I am going to die" is sufficient to lay the foundation that the declarant's state of mind was consciousness of impending and certain death and despair of recovery.

The Supreme Court of Appeals of West Virginia in reaching its conclusion failed to follow the decision of this Court in the case of *Shephard* v. *United States*, 290 U. S. 96 and other representative decisions.

The statement of Mrs. Rosina Fazio that "he robbed me" meaning Robert Ballard Bailey, is her opinion and the admission of her statement is in direct conflict with the case of *Shephard* v. *United States, Supra,* and also is in direct conflict with the West Virginia case of *State* v. *Graham*, 117 S. E. 699; 94 W. Va. 67. The decision in the *Graham* case will be found (R. 171-2), together with an article by Thomas P. Hardman, Dean of the College of Law, University of West Virginia, on this subject. It has been held by authorities that dying declarations must relate to facts and not to mere expressions or belief. Where a person dying from a gunshot declares "A shot me" "A killed me" "A is my murderer" is not admissible as a dying declaration, *State* v. *Baldwin*, 45 N. W. 297, and also the statement made by Mrs. Shephard, — "I am

not going to get well" and "I am going to die" and that "Dr. Shephard poisoned me" were not admissible as a dying declaration. *Shephard* v. *United States, Supra.*

It is interesting that the only evidence in this case as to robbery was by the witness Joe Fazio, when the question was propounded to him: "Did she say anything about her purse?" Answer, — "She said she was robbed." She made this statement only in Italian. We contend that Mrs. Fazio's assertion that she had been robbed was a mere opinion and conclusion and not a statement of fact.

The driver of the ambulance testified that Dominic Fazio, husband of Rosina Fazio, took something resembling a pocketbook from the person of Rosina Fazio (R. 90). Dominic Fazio was not present at the trial; the information that "He is sick in bed" was given by Joe Fazio (R. 77), the same witness upon whom the State relied for the interpretation of the statement of Rosina Fazio which was admitted in evidence as a dying declaration and had been made to him by Mrs. Fazio in the Italian language.

The Supreme Court of Appeals of West Virginia and the courts below have reached erroneous conclusions in this respect and are in direct conflict with this Court and other jurisdictions wherein we have searched.

(b) Whether the trial court erred in giving Instructions Nos. 1, 2, 3, and 4, as offered by the State.

Instruction No. 1 offered by the State in effect told the jury they could return only one of two verdicts: Murder in the first degree or not guilty. The court was in error for two reasons: First, there is no evidence in this record to justify an instruction on the theory of robbery. There is no evidence upon which the jury might base its finding that the defendant killed the deceased while in the at-

tempt of robbery. Second, the court was in error to limit the finding of the jury to murder in the first degree or not guilty, because it destroyed the rule of law relative to the other possible verdicts that may be found under an indictment in West Virginia.

It was error for the court to give Instructions Nos. 2 and 3, because there was no evidence to justify the giving of these instructions.

The court was in error in giving State's Instruction No. 4, when the court stated that one charged with a crime may be convicted by the jury upon circumstantial evidence alone. We do not believe this to be the law and the instruction was confusing to the jury and the instruction did not properly advise the jury of the law.

(c) Whether the trial court erred in refusing to give Defendant's Instructions Nos. 1, 2, 3, 4, 6, 9, 13, 14, 18, 19, 20, 23, 25, 26, 29, and 35.

Defendant's Instructions Nos. 2, 3, and 4 should have been given, because those instructions in effect told the jury of the different degrees in which they could find the defendant guilty. In view of the evidence in this case, the defendant should not have been guilty of anything more than involuntary manslaughter.

Instructions Nos. 9, 10, 11, 12, and 13 should have been given, and the failure of the court to give these instructions was prejudicial to the defendant, especially when his life was involved.

Defendant's Instructions Nos. 6, 9, 10, 14, 19, 20, 23, 25, 26, and 29 were refused—some of them not being applicable according to the construction of the evidence by the court—and some being covered by other instructions. These instructions should have been given.

Defendant's Instruction No. 35, which was refused by the court, was an instruction as to the various degrees of

murder in West Virginia and punishment therefor. The Court's refusal to give these instructions is in direct conflict with its own decision in the case of *State* v. *Allen*, 49 S. E. (2d) 847, and also other authorities.

(d) Whether the court erred in refusing to direct the jury to find the defendant not guilty, and also whether the court erred in refusing to set aside the verdict of the jury.

We submit that the evidence in this case is not sufficient to sustain the verdict of death of Robert Ballard Bailey. First, the State's proof was by the witness Ruby Evans who saw Mrs. Fazio at 3:30 o'clock in a car with a man whom she identified as Bailey. Walter J. Mullins saw Mrs. Fazio lying in a ditch between three and four o'clock. (Note, it is not a five minute drive from where Mrs. Evans saw Mrs. Fazio to the place where Mr. Mullins found her lying in the ditch.) The witness Mullins identified the driver of the car as Bailey. He also said that the car that picked up Mrs. Fazio was the same car that was driving ahead of him and from which he saw a woman's leg protrude before he reached the curve where he found Mrs. Fazio lying in the ditch. It is interesting that on return of the car he did not ask the driver of that car what had happened to Mrs. Fazio, or why he would ask the driver of that car, after he had seen Mrs. Fazio come out of said car, to take her to a hospital or to her home. This evidence is in direct conflict with other evidence of the State in respect to Robert Ballard Bailey's whereabouts. The police saw Bailey and arrested three boys who were with him in another section of the city at 3:30 o'clock—at the same time Mrs. Evans saw him with Mrs. Fazio in his car. The police pursued Bailey for some distance and were still pursuing Bailey at the same time that Mullins was at the scene where Mrs. Fazio came out of the car. Bailey could not have been in two different places at the same time. This evidence is irreconcilable. The record clearly shows that Bailey denied

any knowledge of the incident involving Mrs. Fazio. At the time the witness Mullins found Mrs. Fazio, the witness Coleman was also at the scene of the incident, and Mrs. Coleman's husband, John Coleman, came in a cab later. The two affidavits, presented to the Supreme Court of Appeals of West Virginia as newly discovered evidence, of Mrs. Coleman and her husband, John Coleman, was that the man who was driving the car in which Mrs. Fazio was placed was not Robert Ballard Bailey. Mrs. Coleman's affidavit which was filed with the Supreme Court of Appeals of West Virginia, together with her husband's affidavit, (R. 177-180) is proof that both Mrs. Evans and Mr. Mullins were mistaken in their identification of Bailey, and that the evidence of the police offered by the State was accurate. It is interesting to note in the affidavit of Mrs. Coleman that the man in whose car Mrs. Fazio was placed was not Robert Ballard Bailey, and also her husband told the police, according to his affidavit, that it was a green car and that the man who was driving the car in which Mrs. Fazio was placed was not Robert Ballard Bailey. We do not know the reason for suppressing the evidence of these two witnesses. Also the affidavits of Goldie Moore, George A. Rowlands and Carlin Smith which evidence was discovered since the determination by the Supreme Court of Appeals of West Virginia. (Appendix "B", "C" and "D"). The entire evidence joined together shows beyond a reasonable doubt that it was impossible for Robert Ballard Bailey to have committed the crime as charged in the indictment.

We submit that the statement of Rosina Fazio was not admissible in evidence as a dying declaration. We contend and urge that the trial court erred in refusing to direct the jury to find the defendant not guilty and/or to set aside the jury verdict of guilty without recom-

mendation and imposing the death penalty upon Robert Ballard Bailey.

We contend that the petitioner's case should be reopened and a new trial granted to him because of the newly discovered evidence, the affidavits of Mr. and Mrs. Coleman (R. 177-180) which were considered by the Supreme Court of Appeals of West Virginia, and the affidavits of Goldie Moore, George A. Rowlands and Carlin Smith, evidence discovered after consideration by the Supreme Court of Appeals of West Virginia (Appendix "B", "C" and "D"); otherwise Robert Ballard Bailey's life will be taken without due process of law, in violation of the Constitution of the United States.

CONCLUSION

Your petitioner respectfully submits that the questions presented by the foregoing petition shows that the highest tribunal of the State of West Virginia considered a federal question and further that the foregoing petition shows a well defined conflict exists between the decisions of the Supreme Court of Appeals of West Virginia, and further that the decisions of the Supreme Court of Appeals of West Virginia is in conflict with its own prior decisions and the decisions of courts of other jurisdictions, and that there is involved important questions of Constitutional and Federal law in this case, and this case is one calling for the exercise by this Court of its supervisory powers in order that the rights under the Constitution of the United States and the Constitution of the State of West Virginia be preserved, and a writ of certiorari should be granted and the questions herein should be reviewed by this Court.

Respectfully submitted,

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Attorney for and of

Counsel with Petitioner.